UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FREDERICK WEICHEL, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 1:15-cv-13112

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Frederick Weichel ("Mr. Weichel" or "Plaintiff") brings this action against Defendant United States Department of Justice ("DOJ") to compel compliance with the Freedom of Information Act, 5 U.S.C. §552 ("FOIA") and to seek the immediate processing and release of agency records requested by Plaintiff from and improperly withheld by the DOJ. As grounds therefor, Mr. Weichel states as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff is an inmate at the Massachusetts Correctional Institute - Norfolk located at 2 Clark Street, Norfolk, Massachusetts 02056.

4. Defendant is a Department of the Executive Branch of the United States Government, and includes component entities Federal Bureau of Investigations ("FBI") and

Drug Enforcement Authority ("DEA"). The DOJ is an agency within the meaning of 5 U.S.C. § 552(f) and is headquartered at U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-00001. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On August 20, 1981, Mr. Weichel was convicted of the May 31, 1980 murder of Robert LaMonica in Braintree, Massachusetts (the "LaMonica Murder") for which he is presently serving a life sentence.

6. Over the last 35 years, Mr. Weichel has maintained his innocence and, indeed, after he was convicted of the LaMonica Murder, Mr. Weichel's mother received a remorseful letter from Thomas Barrett ("Barrett") in which Barrett confessed to having killed LaMonica.

7. At the time of his trial, Mr. Weichel's defense was hampered because of threats made by James "Whitey" Bulger and Steve "The Rifleman" Flemmi, who warned Mr. Weichel not to implicate Barrett in the murder and further instructed former corrupt FBI agent John Connolly, who was in a bar with Mr. Weichel on the night of the murder, not to provide support for Mr. Weichel's alibi defense.

8. Mr. Weichel seeks any information that the FBI may have concerning: (a) Mr. Bulger's knowledge (and the FBI's knowledge) that someone other than Mr. Weichel committed the LaMonica Murder, including but not limited to Thomas Barrett; (b) Mr. Bulger's threats to Mr. Weichel that he not implicate Barrett in the LaMonica Murder; (c) the whereabouts of former FBI Agent John Connolly on the night of the LaMonica Murder and the fact that Connolly could have supported Mr. Weichel's alibi; and (d) the origins of the photograph of Mr.

Weichel that was used in the original photo array on the night of the LaMonica Murder, even though Mr. Weichel was not even considered a suspect at that time.

9. Almost five years ago, on July 15, 2010, Mr. Weichel submitted a FOIA request to the Office of the United States Attorney for the District of Massachusetts and the FBI requesting any information that these agencies may have concerning, *inter alia*, Mr. Weichel, the LaMonica Murder, and the whereabouts of John Connolly on the night of the LaMonica Murder. A copy of this request is attached hereto as Exhibit A.

10. Specifically, Mr. Weichel requested: (a) any exculpatory evidence that tended to show Mr. Weichel was not involved in the LaMonica Murder; (b) any evidence relevant to impeach the credibility of the testimony of, *inter alia*, John Foley, Boston Police Officer Walter Derby, Edward "Eddie" MacKenzie, Jr., Patrick Nee, Boston Police Officer Edward Walsh, Massachusetts State Police Trooper Kevin Sprague, Kevin Weeks, or Assistant District Attorneys Gerald Kirby, Esq., Warren Powers, Esq., or Sydney Hanlon, Esq.; (c) records of internal affairs investigations concerning former Special Agent John Connolly and former Special Agent John Newton between the dates of January 1, 1975 and January 1,2010; (d) documents regarding the whereabouts of former Special Agent John Connolly on the dates of May 30, 1980 and June 1, 1980; (e) documents regarding Mr. Weichel; (f) documents regarding Thomas Barrett; (g) documents regarding the LaMonica Murder; (h) documents regarding the keyword "Tommy Barrett."

11. Although Defendant was required to respond to Mr. Weichel's FOIA request within twenty (20) working days pursuant to 5 U.S.C. § 552(a)(6)(A), the FBI did not provide a substantive response to Mr. Weichel's request until almost a year later, on March 30, 2011,

whereupon the FBI identified 55 relevant pages of documentation, but produced none. A copy of this response is attached hereto as Exhibit B.

12. While the March 30, 2011 letter notes that "55 pages were reviewed," the attached "deleted page information sheet" noted a total of 63 potentially relevant pages. The index fails to provide a description as to the nature of the documents or the contents of the portions that were withheld.

13. Within those 55 pages, the FBI determined that 22 were allegedly exempt pursuant to 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D). The letter further stated that "of the remaining 33 pages, 19 were originated with another government agency and were referred to the originating agency for their review and direct response to you." The remaining fourteen pages were found to be duplicative and were not processed.

14. After receiving the FBI's March 30, 2011 response, Mr. Weichel appealed it to the Office of Information Policy on May 27, 2011 for a further consideration of the exempted material. On September 27, 2011, the Office of Information Policy upheld the FBI's action. A copy of Mr. Weichel's appeal and the Office of Information Policy's response are attached hereto as Exhibits C and D, respectively.

15. Thereafter, the Office of Government Information Services contacted Mr. Weichel to attempt to mediate the ongoing dispute with the FBI. That effort failed.

16. On November 16, 2012, more than a year after the FBI purportedly referred the 19 pages of relevant documents to the "originating agency" for review and analysis, Mr. Weichel learned that the 19 pages the FBI had withheld for further analysis had been referred to the Criminal Division of the Department of Justice.

17. It was not until May 23, 2013 – more than two years after the initial referral – that the Criminal Division completed its review of the 19 pages and responded to Mr. Weichel, claiming: (i) that 18 of the 19 responsive pages referred to it were exempt pursuant to 5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(F), and (ii) that the 19th page was partially exempt pursuant to 5 U.S.C. § 552(b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(F) and, thus, the Criminal Division produced only this page with redactions. A copy of this response is attached hereto as Exhibit E.

18. On July 22, 2013, Mr. Weichel appealed the FBI and the Criminal Division's determination, but the DOJ's Office of Information Policy denied this appeal on July 22, 2014. A copy of this appeal is attached hereto as Exhibit F.

19. Over the past several years, Mr. Weichel has appealed the FBI's categorization of the Responsive Documents and has refined his request to be as explicit as possible. See, e.g., FOIA Request, dated March 15, 2013, to FBI and United States Attorney's Office, attached hereto as Exhibit G.

20. In response, the FBI has provided a total of ten pages of documentation, all of which are merely reproductions of articles concerning the LaMonica Murder that appeared in local newspapers over the years. A copy of this production provided on November 27, 2013 is attached hereto as Exhibit H.

21. In August 2013, based, in part, upon new facts discovered through public records requests from other agencies, Mr. Weichel's counsel filed a Motion for New Trial with the Massachusetts Superior Court for Norfolk County, and that court has granted Mr. Weichel an evidentiary hearing.

22. The evidentiary hearing on Mr. Weichel's Motion for New Trial will determine whether Mr. Weichel's conviction will be overturned. Mr. Weichel has a compelling need to obtain any potentially relevant documents in advance of this hearing.

23. Regardless of whatever exemption is claimed, the DOJ's own regulations contain an express carve-out allowing for disclosure where "the administration of justice" so requires. See 28 C.F.R. § 16.26(b). This regulation notes that, in evaluating whether "disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief . . . consideration shall be given to:

> (1) The seriousness of the violation or crime involved,
> (2) The past history or criminal record of the violator or accused,
> (3) The importance of the relief sought,
> (4) The importance of the legal issues presented,
> (5) Other matters brought to the attention of the Deputy or Associate Attorney General."

Id. In the context of criminal proceedings, this regulation has been interpreted by other courts as requiring disclosure of any information that may be material to the requesting party's defense and, therefore, necessary to guarantee due process. See Buford v. State, 158 Ga. App. 763, 767 (Ga. Ct. App. 1981) ("the trial court, in a criminal case, has the power, indeed the manifest duty, to marshall the evidence and vindicate the constitutional guarantees of a criminal defendant's rights . . . ."); see also People v. Heller, 483 N.Y.S.2d 590, 592 (N.Y. S.Ct. 1984) ("A trial cannot comport with the requirements of due process if evidence pertaining to guilt or innocence is kept under wraps, and this must be true regardless of the motives of the prosecution in doing so") (quoting Brady v. Maryland, 373 US. 83 (1963)). This interpretation is consistent with United States v. Agurs and Brady v. Maryland, in which the Supreme Court held that where there has been a specific demand for information, due process requires disclosure if the information might affect either the outcome of trial or imposition of punishment. See Agurs, 427 U.S. 97, 104 (1976); Brady, 373 U.S. at 87.

24. In light of Mr. Weichel's several failed appeals, Mr. Weichel has exhausted any and all administrative remedies with respect to his FOIA request. See 5 U.S.C. §552(a)(6)(C).

COUNT I
(Violation of FOIA, 5 U.S.C. § 52)

25. Mr. Weichel reallages paragraphs 1 through 24 as if fully stated herein.

26. Defendant's failure to make promptly available the records sought by Plaintiff violates the FOIA, 5. U.S.C. §552(a)(3)(A), because the DOJ failed to make the requested records available even though they were reasonably described by Plaintiff.

27. Defendant's failure to release the records sought by Plaintiff violates the FOIA, 5 U.S.C. § 552(a), because Defendant wholly withheld documents, rather than producing the requested documents with deletions of any information deemed to allegedly contain identifying or sensitive details.

28. Mr. Weichel has exhausted his administrative remedies.

29. Mr. Weichel is being irreparably harmed by reason of Defendant's unlawful withholding of requested records, and Mr. Weichel will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

REQUESTED RELIEF

WHEREFORE, Mr. Weichel respectfully requests that this Court:

(1) order Defendant to forthwith disclose the requested records in their entirety and make copies available to Plaintiff, including the previously identified 19 pages of relevant material;

(2) award Mr. Weichel an award of litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E); and

(3) award Mr. Weichel such other relief as the Court deems just and proper.

Respectfully submitted,

PLAINTIFF FREDERICK WEICHEL,

By his counsel,

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Dated: August 7, 2015

/s/ Michael D. Ricciuti

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